ORAL ARGUMENT NOT YET SCHEDULED

Nos. 02-1244, 02-1246, 02-1247, 02-1248, 02-1249 (consolidated petitions)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1244

BEETHOVEN.COM LLC, ET AL.,
Petitioners

v.

LIBRARIAN OF CONGRESS,
Respondent

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, ET AL.,
Intervenors.

ON PETITION FOR REVIEW OF THE JUNE 20, 2002 FINAL RULE AND ORDER OF THE LIBRARIAN OF CONGRESS CONCERNING THE DETERMINATION OF REASONABLE RATES AND TERMS FOR THE DIGITAL PERFORMANCE AND EPHEMERAL RECORDINGS OF SOUND RECORDINGS

FINAL REPLY BRIEF FOR CONSOLIDATED PARTICIPANT LICENSEE PETITIONERS SALEM COMMUNICATIONS CORP. AND THE NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE

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GLOSSARY

Broadcasters, as used in this brief, refers to the terrestrial radio broadcaster parties who participated in the proceeding below and who are engaging in, or interested in engaging in, simulcasting over the Internet of their over-the-air AM or FM radio broadcast programming.

CARP refers to the Copyright Arbitration Royalty Panel that recommended to the Librarian of Congress rates and terms for the digital public performances of sound recordings at issue in this proceeding for the period October 28, 1998 through December 31, 2002. In this brief, the "CARP" is also referred to as the "Panel."

Digital Sound Recording Performance Right refers to a new copyright in the public performance of sound recordings via certain digital audio transmissions. This copyright did not exist at all until 1995 and did not apply to non-subscription transmissions until 1998.

Ephemeral Recording, as used in 17 U.S.C. §112, refers to reproductions of works for the sole purpose of performance.

IO Transmissions, or "**Internet-only Transmissions**," as used in this brief, refer to transmissions of programming exclusively over the Internet. This term contrasts with "simulcasts," which refer to simultaneous transmissions over the Internet of AM or FM radio broadcast programming transmitted over the air.

Librarian's Order refers to the final decision by the Librarian of Congress reviewing the February 20, 2002 Final Report of the Copyright Arbitration Royalty Panel determining the rates and terms for the digital performance of sound recordings and ephemeral recordings at issue in this proceeding. *See* Final Rule and Order, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240 (July 8, 2002) (JA-0483-520).

NRBMLC refers to the National Religious Broadcasters Music License Committee, which is a committee formed to represent the music licensing interests of religious, classical and other specialty formatted radio stations. In this proceeding, the NRBMLC represents 162 commercial radio stations owned by a great many different broadcasters that either stream or are interested in streaming their broadcast programming over the Internet as an ancillary service to their listeners.

Panel refers to the Copyright Arbitration Royalty Panel that recommended to the Librarian of Congress rates and terms for the digital public performances of sound recordings at issue in this proceeding for the period October 28, 1998 through December 31, 2002. In this brief, the "Panel" is also referred to as the "CARP."

Report refers to the report of the Panel that was the subject of review by the Librarian. See Final Report of the Copyright Arbitration Royalty Panel in Docket No. 2000-9 CARP DTRA 1 & 2 (JA-0327-469; JA-0750-884).

Participant Licensee Petitioners refers to Salem Communications Corp., the National Religious Broadcasters Music License Committee, and Live365.com, Inc. Participant Licensee Petitioners participated fully as parties in the CARP proceeding and filed in this Court timely petitions to review the Librarian's Librarian's Order.

RIAA refers to the Recording Industry Association of America, the trade association that represents the U.S. recording industry. RIAA's member record companies create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. RIAA formed the "RIAA Negotiating Committee" to develop a coordinated strategy for exploitation of the digital sound recording performance right.

Services, as used in this brief, refers to the Broadcasters and Webcasters who participated in the proceeding below.

Simulcast Transmissions refer to simultaneous transmissions over the Internet of AM or FM radio broadcast programming transmitted over the air. This term contrasts with "IO transmissions," or "Internet-only transmissions," which refer to transmissions of programming exclusively over the Internet.

Sound Recording typically refers to the fixation of renditions of musical works, which themselves typically are copyrighted works owned by music publishers.

Webcasters, as used in this brief, refers to the parties engaging in Internet-only transmissions of sound recordings who participated in the proceeding below.

SUMMARY OF ARGUMENT

The Government says very little of substance in response to the opening brief of Participating Licensee Petitioners ("Broadcasters' Opening Brief" or "Broadcasters' Br.").[1] Instead, the Government seeks to prevent judicial scrutiny of the Librarian's decision, which cannot withstand even deferential review. Thus, the Government urges this Court to apply an improperly circumscribed standard of review and declares, wrongly, that the issues challenged by Broadcasters have been "committed to agency discretion." They have not been, and this Court should not sit as a rubber stamp.

The Government does not challenge the facts set forth in Broadcaster's Opening Statement of Facts. Thus, the Government does not deny that the Librarian's decision was based solely on construction of a single agreement, between RIAA's cartel and one service, Yahoo. The cartel acted pursuant to its concerted plan to create CARP evidence that would justify a supra-competitive rate.

If it was proper to use the Yahoo agreement at all, it was essential to adjust the fee reflected in that agreement to account for the enormous impact that the avoidance of litigation costs had on the price Yahoo was willing to pay. The Government has no plausible explanation for the Librarian's failure to do so. The Librarian recognized that a downward adjustment would be appropriate and the record contained uncontroverted evidence quantifying the effect of litigation costs on Yahoo's decision. Yahoo paid essentially all of what it paid to avoid otherwise inevitable litigation costs. Reliance on the Yahoo agreement in light of that fact was arbitrary. The Government sole response is to deny that Broadcasters made the arguments they made. That is no response.

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[1] The only non-broadcaster Participating Licensee Petitioner, Live365, is no longer in the case.

Treating the Yahoo agreement as a "comparable" benchmark for a hypothetical competitive market was arbitrary for additional reasons. First, as Broadcasters argued, the record contained no evidence supporting the Librarian's finding that the RIAA cartel's market power was offset by Yahoo's bargaining power. The Government points to none. It simply denies that Broadcasters made the argument. Second, Broadcasters pointed to extensive record evidence demonstrating the critical marketplace differences between Yahoo and radio broadcasters. Lacking a response, the Government denies that Broadcasters made these arguments. The Government also argues the startling proposition that the economic interests of a class of buyers is irrelevant as a matter of law in determining what "most willing buyers would pay willing sellers." Nothing the Government cites supports that proposition.

Nor does the Government justify the Librarian's refusal to credit the Panel's factual finding, supported by extensive evidence, that radio retransmissions should be subjected to a substantially lower rate than Internet-only transmissions. Among other things, the Panel found that record companies pay many millions of dollars per year in the free market to cause radio stations to make these very same performances over the air because of their promotional value. The Government argues that such a result was inconsistent with the Librarian's view of the Yahoo agreement. That argument, however, says more about the Librarian's erroneous reliance on Yahoo than it does about the Panel's correct finding.

Finally, nothing in the petition of the Copyright Owners and Performers ("Copyright Owners") justifies a higher fee. The Panel and Librarian properly rejected the 25 non-Yahoo "benchmark agreements" on the basis of the extensive record evidence of RIAA's cartel behavior and efforts to create supra-competitive CARP evidence. RIAA repeatedly stated that it was not offering the other "corroborating" agreements, negotiated by cartel members often for

unrelated rights, as benchmarks. Absent valid benchmark agreements, those agreements had nothing to corroborate.

ARGUMENT

The Government's Brief offers three theories to avoid judicial review of the Librarian's decision to impose an indefensibly high statutory license fee on broadcasters who wish to stream their programming over the Internet. Each is wrong. This effort is understandable—the decision cannot withstand even deferential scrutiny.

First, the Government would have this Court hold that the Librarian's decision is essentially a matter of unreviewable agency fiat. The Government mischaracterizes (e.g., Br. 17, 63, 68, 69) virtually every challenged aspect of the decision as evidence weighing or "policy judgments" "committed to the Librarian's discretion." But this Court's role is not so circumscribed. Congress directed this Court to review, not rubber stamp, the Librarian's decision.

Second, the Government twice (Br. 14, 43) accuses Broadcasters of making "extensive" use of "extra-record" material, and urges this Court (Br. 44) to "disregard arguments based on such materials." In fact, each of Broadcasters' arguments is based entirely on record evidence or the lack thereof. Broadcasters brief includes two brief footnotes concerning post-hearing events that confirm and highlight evidence and arguments of record. The footnotes were proper.

In the few pages purportedly devoted to a substantive response to Broadcasters, the Government makes a final attempt to avoid judicial review, ducking principal arguments expressly made by Broadcasters by denying (Br. 69, 72, 77, 80) the arguments were ever made. But the Government cannot wish these arguments away. As a result, many of Broadcasters' arguments remain wholly unanswered.

There is one fundamental issue of statutory construction that is never mentioned in the Government's Brief. The Librarian affirmed the Panel's conclusion that the relevant fee should be "'the rates to which, absent special circumstances, most willing buyers and willing sellers would agree' in a competitive marketplace," with the marketplace defined as the "hypothetical marketplace that was not constrained by a compulsory license." Librarian's Order 45,244-45 (JA-0488-89) (emphasis added); Report 21, 24-25 (JA-0355, JA-0358-59). The Government cannot square this standard with the Librarian's decision to charge Broadcasters the fee agreed in a single agreement reached in a non-competitive marketplace by a non-broadcaster buyer with concededly special needs and interests.

I. THE SOUND RECORDING PERFORMANCE FEE IS NOT "COMMITTED TO AGENCY DISCRETION" AND IS SUBJECT TO JUDICIAL MEANINGFUL REVIEW

The Government labels each of Broadcasters' challenges to the Librarian's decision as relating to "evidence weighing" and quotes *National Ass'n of Broadcasters v. Librarian*, 146 F.3d 907 (D.C. Cir. 1998) ("*NAB*"), for the proposition that this Court may not "independently weigh the evidence or determine the credibility of witnesses." Government's Br. 17, 63. However, the Librarian's failures here cannot be ascribed to weighing evidence, determining credibility, or even determining "copyright policy."

The Librarian's actions are not "committed to agency discretion." Only very rarely is action committed to an agency's discretion, precluding meaningful review. 5 U.S.C. § 701(a)(2); *Robbins v. Reagan*, 780 F.2d 37, 46 (D.C. Cir. 1985) (*per curium*) (§ 701(a)(2) is "a very narrow exception"). There is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

Nor are all aspects of the Librarian's decision relating to "evidence" insulated from review. This Court has held that it will set aside the Librarian's decision "if we determine that the evidence before the Librarian compels a substantially different award." *NAB* 146 F.3d at 918 (emphasis added). This Court has also stated that "we think the Librarian would plainly act in an arbitrary manner if, without explanation or adjustment, he adopted an award proposed by the Panel that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award." *Id.* at 923 (emphasis added). The decision must also be "plausibly explained ... in a manner that does not plainly contravene applicable statutory provisions." *Id.* at 924. The Librarian's decision here does not meet these standards.

Further, the issues presented in this case differ in important respects from those presented in *NAB* and *Recording Industry Ass'n v. Librarian*, 176 F.3d 528 (D.C. Cir. 1999) ("*RIAA*"), also cited by the Government. As this Court has held, "any standard of review must be adapted to fit the administrative decisionmaking process to which it is to be applied." *NAB,* 146 F.3d at 922. The context here counsels less, not more, deference.

NAB involved the distribution of a royalty fund among competing claimants, with no applicable criteria or standards. *See Id.* at 911-12 (describing standardless process); *see* 17 U.S.C. §§ 111(d)(4)(B), 801(b)(3). This Court found that the Register and Librarian possessed "expertise in royalty distribution." *NAB,* 146 F.3d at 923. *RIAA* involved rate setting under the pre-1998 standard, which requires consideration of four policy-oriented factors. 17 U.S.C. § 801(b)(1).[2] As the Librarian explained: "[The section 801(b) standard] is policy-driven, whereas

[2] These factors include consideration of how to "maximize the availability of creative works," determining "fair" return to the copyright owner and "fair" income to the user, reflecting "the relative roles of the copyright owner and the copyright user in the product made available to the public," and "minimiz[ing] any disruptive impact" on the affected industries 17 U.S.C. § 801(b)(1).

the standard for setting rates for nonsubscription services set forth in section 114(f)(2)(B) is strictly fair market value—willing buyer/willing seller." Librarian's Order 45,244 (emphasis added). The Librarian and Register may have expertise in matters of distribution and copyright policy; there is no reason for concluding that they have special expertise in the economic question of what prices a competitive fair market would yield.

II. THE LIBRARIAN'S FAILURE TO ADJUST THE YAHOO FEE TO ACCOUNT FOR YAHOO'S SUBSTANTIAL LITIGATION COST SAVINGS YIELDS A RESULT THAT BEARS NO RELATIONSHIP TO THE RECORD EVIDENCE AND IS BASED ON AN EXPLANATION THAT IS NOT FACIALLY PLAUSIBLE.

The Government has no plausible explanation for the Librarian's failure to reduce the fee reflected in the Yahoo agreement to account for the effect of Yahoo's litigation cost savings. Further, this failure is flatly contradicted by the record evidence. Under any standard of review, this was arbitrary.

Broadcasters' Opening Brief detailed the uncontroverted evidence presented by Yahoo concerning its decision to enter into the Yahoo Agreement and the overriding importance of litigation cost savings in that decision. Indeed, Broadcasters showed with detailed, quantified record evidence (at 9-12, 31-33) that (i) Yahoo made the decision to settle with RIAA based on its estimate of the cost of participating in the arbitration, (ii) the precise litigation cost savings Yahoo anticipated was the same as the amount Yahoo paid under its agreement, and, therefore, (iii) based on Yahoo's own decisional calculus for entering into the Yahoo Agreement, the real payment for the sound recording performance right represented by that Agreement approximated $0.

The Government's Brief (at 79) reaffirms the Librarian's view that a downward adjustment for litigation cost savings is appropriate and that the Services' argument on this point is "well taken." This conclusion is unassailable as a matter of statutory construction: to the

extent that the fees paid by Yahoo represent Yahoo's effort to avoid the otherwise inevitable cost of arbitration, they do not represent what most willing buyers would pay willing sellers for the sound recording performance right in a competitive market unaffected by the statutory license.

The Librarian's failure to make an adjustment must therefore stand or fall on his conclusions that the record did not permit quantification of the effect of litigation cost savings, and in any event, consideration of the savings would not yield a fee outside of the "zone of reasonableness" established by the Librarian. Librarian's Order 45,255 (JA-0499); Government Br. 80-81.

The Government's brief does not dispute or challenge the record facts cited by Broadcasters; it wholly ignores them. The Government also ignores the arguments made by Broadcasters, instead denying that Broadcasters made them. The Government asserts that "the Broadcasters have made no attempt to 'quantify' the evidence they cite in terms of its impact on actual rate." Government Br. 80. It also asserts that Broadcasters "do not argue that the record evidence they cite would be sufficient to place the resulting rate outside the zone of reasonableness otherwise independently determined by the Librarian." *Id.*

The Government is wrong on both counts. Broadcasters' Opening Brief (at 31-33) offers a precise quantification, from the record, of the effect of litigation costs on the Yahoo deal and demonstrates that the record evidence indisputably places the true rate represented by the Yahoo agreement far "outside the zone of reasonableness" determined by the Librarian. The brief quantifies this effect based on Yahoo's own testimony ("Yahoo expected to save [in litigation costs] more than $2,000,000 by making the deal" and that amount equaled "the roughly $2,000,000 in total fees Yahoo paid under the RIAA agreement") and on the words of Arbitrator Von Kann (applying Yahoo's own decisionmaking criterion, "You'd have to get a negative

royalty" from litigation before it would have made sense to not do the deal). Broadcasters' Br. 32. Broadcasters conclude their argument stating "[a]ll that can be concluded about Yahoo as a willing buyer was that it expected the CARP to set a fair market value of at least zero." Broadcasters' Br. 33.

This is more than an "attempt" to quantify the effect of litigation costs. It is an explicit quantification, supported by uncontroverted record evidence. Further, 0.0¢ falls well outside of the zone of reasonableness of "between .065¢ and .083¢" set by the Librarian. Government's Br. 80. At minimum, the record evidence compels the conclusion that the Yahoo agreement does not support a value of the performance right close to the rate set by the Librarian.

The Government reiterates the Librarian's clearly erroneous reliance on his belief that the Panel found "a lack of record evidence quantifying value of any factor." Government Br. 79. There was no such finding, and the passage cited by the Government and the Librarian is taken grossly out of context. The Government does not even attempt to respond to Broadcaster's showing that the Panel's discussion the Librarian cites had nothing whatsoever to do with the Yahoo agreement or litigation costs. Broadcasters' Br. 32 n.16. The cited statement appears in a section of the Panel's Report entitled "Webcaster Rate Proposals," in a passage describing the factors that demonstrated the conservative nature of *the Services'* musical work benchmark presented by *the Services'* expert, in *the Services'* direct case (written before the Yahoo agreement was even revealed by RIAA and long before Yahoo's own evidence was presented). The Panel's statement cannot be read as a conclusion that Yahoo's litigation cost saving, or its effect on its agreement with RIAA, was not quantifiable. There is no such finding.[3]

[3] In fact, the Panel found that the effect of litigation costs was to inflate the rates. Report at 69 (Section V(G)(7)(d))(JA-0403). However, the Panel never reduced the radio redistribution rate to account for this fact, curiously stating that "we must adjust downward the IO rate to offset the

In sum, the Librarian's reliance on the fee reflected in the Yahoo agreement without substantial downward adjustment for Yahoo's litigation cost savings was arbitrary. The resulting fee is not supported by and does not bear a rational relationship to the record evidence. The Government's explanation for the Librarian's failure to make the adjustment is not plausible and is flatly contradicted by the record. On this ground alone, the decision of the Librarian should be reversed.

III. THE LIBRARIAN FAILS TO JUSTIFY HIS RELIANCE ON AN AGREEMENT THAT WAS NOT COMPARABLE TO AN AGREEMENT BETWEEN A WILLING BROADCASTER AND A WILLING RECORD COMPANY IN A FREELY COMPETITIVE MARKETPLACE

In describing the "willing buyer/willing seller" standard, the Copyright Act provides that the Panel "may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated [during the statutory negotiation periods provided by 17 U.S.C. §114(f)(2)(A)]." 17 U.S.C. §114(f)(2)(B) (emphasis added). This provision implicitly precludes consideration of such agreements that are not "comparable." At minimum, it requires the Panel and the Librarian to make adjustments for non-comparable aspects of the agreements before using them to set fees.

In the closely analogous context of musical works performance rights, the Second Circuit has described such agreements, even for similar rights, as "very imperfect surrogates" and has stated that use of such benchmarks "of course requires not only an analysis of comparability, but

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inflationary factors previously identified in Section V(G)(7)(c) and (d), and we must adjust upward the RR rate." *Id.* at 75 (JA-0409). The Panel made no effort to quantify the litigation cost effect. Further, the Panel erroneously thought that the importance of the effect was somewhat offset by the potential effect of litigation costs on RIAA, a factor correctly not cited by the Librarian. *Id.* 68-69 (JA-0402-03). The RIAA's speculative litigation cost savings says nothing about the fee a willing buyer would be willing to pay for the sound recording performance right. Moreover, the settlement ensured Yahoo was out of the case; RIAA still faced litigation against many other parties.

also consideration of the degree to which the assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on the agreements it has spawned." *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 577 (2d Cir. 1990).

The Panel and Librarian gave the Yahoo agreement preclusive preferred status, declaring it to be "actual evidence of marketplace value of the performance of the sound recordings," Librarian's Order 45, 247 (JA-0491), and, after the fact, placing the burden on the Services to quantify the effect of points on which the agreement was not "comparable." In the face of the statutory requirement of comparability, that was error.

Broadcasters Opening Brief demonstrated that the Yahoo agreement was not comparable to an agreement between broadcasters and record companies in the relevant freely competitive market. Broadcasters' Br. 19-28. The market was far from competitive, the agreement was negotiated as part of RIAA's overall strategy to create CARP evidence, the seller cartel was nothing like an individual record company, and the buyer was nothing like a broadcaster. Each of these factors supports a conclusion that the Yahoo Agreement was not comparable. These factors combined resulted in a grossly inflated fee.

The Government's brief does not provide any basis for the Librarian's determination that the Yahoo agreement was "comparable." Instead, it baldly asserts (Br. 63) that the Yahoo agreement (and, the RIAA's other 25 agreements) were "such agreements" and that "[i]t was thus indisputably proper as a matter of law for the Panel and the Librarian to consider these agreements." No further explanation or support is provided.

A. There Is No Record Evidence Supporting the Librarian's Conclusion that the RIAA Cartel's Market Power Was Offset by Yahoo's Bargaining Power, and the Government Identifies None.

Broadcasters argued in detail (Br. 8-12, 22-25) that the Yahoo Agreement was not comparable to an agreement negotiated in a freely competitive marketplace because of the

market power and collective strategy exercised by the RIAA cartel—the same market power and strategy to develop evidence that led the Panel and Librarian to reject 25 of the 26 agreements presented by RIAA. The Government's sole response (Br. 68-69) is that the Librarian agreed that the evidence supported the Panel's finding that "Yahoo! had 'comparable resources and bargaining power to those RIAA brought to the table," and that "[w]hile the Broadcasters dispute these conclusions, the Broadcasters do not dispute that there is evidence supporting those conclusions." (emphasis added).

Once again, the Government attempts to deny the existence of an argument made by Broadcasters at length. Broadcasters' Br. 22-25. Broadcasters' brief expressly stated that "the record is devoid of evidence that one user, however large, possessed market power, resources or sophistication 'comparable' to the collective power of the entire recording industry acting pursuant to a common scheme." *Id.* at 24-25. Indeed, this argument was made under the heading that the Librarian's determination "was purely speculative and contrary to the record." *Id.* at 22.

In the face of this explicit challenge, the Government fails to offer a single record citation to support the Librarian's conclusion. Its silence speaks volumes; there is no record support. In fact, as demonstrated by Broadcasters, the record evidence contradicts the Librarian's conclusion. *Id.* at 21-24. Broadcasters not only disputed the comparability of Yahoo's bargaining power, they explicitly highlighted the complete lack of any evidence supporting the Librarian's arbitrary conclusion.

B. Contrary to the Government's Contentions, the Differences Between Yahoo and Broadcasters Are Relevant and Clearly Demonstrated in the Record.

The Government seeks to dismiss the numerous identified differences between Yahoo and Broadcasters with a two-pronged attack. First, it argues that Broadcasters failed to introduce

"market evidence" of the differences. Second, the Government claims that in any event, such evidence is irrelevant because the right in question is the same for both webcasters and broadcasters and, therefore, the fee should be the same. The first argument wholly ignores the extensive record evidence, market and otherwise, discussed in Broadcasters' Opening Brief. The second ignores the obvious principle that fair market value is determined not only by what is being licensed but by the characteristics of the willing buyers and willing sellers willing to enter into the license.

It cannot be gainsaid that determination of what willing buyers will pay willing sellers requires consideration of the needs of the relevant buyers and their economic circumstances. The Librarian himself recognized this fact in setting a distinct and significantly lower rate for non-commercial broadcasters on the "basis of their financial resources, noting that noncommercial stations depend upon funding from the government, businesses, and viewers, whereas commercial broadcasters generate a revenue stream through advertising." Librarian's Order 45,258 (JA-0502).

Common experience demonstrates that even where the same right is at issue, the competitive market value of that right can vary dramatically depending on the characteristics of the buyers, even where the seller is the same. The right to sit in the same airline seat from Washington to Los Angeles, for example, can cost a business traveler more than $1,200 and a leisure traveler only one-tenth of that amount.

Here, Broadcasters presented extensive record evidence of the differences between Broadcasters and Yahoo demonstrating that the majority of willing buyer broadcasters would pay a fee far lower than what Yahoo was willing to pay. Broadcasters' Br. 16, 25-27. The Government responds (Br. 69) that this demonstration "fails for failure of proof," and asserts (Br.

72) that Broadcasters "failed to introduce specific market evidence about any alleged differences for broadcasters." However, the Government does not contest any of the uncontroverted record facts set forth in Broadcasters brief. It simply ignores them.

The Government also ignores the specific market evidence of how broadcasters behaved in the actual marketplace. While Yahoo chose to enter into a license agreement with RIAA, not a single broadcaster entered into such a deal, notwithstanding the substantial litigation cost savings that they, too, would have realized. Broadcasters' Br. 26.

The evidence cited by Broadcasters included the testimony of numerous broadcaster witnesses and the uncontradicted testimony of Yahoo that it, in its business judgment, could not pass along even a fee of .05¢ per performance to its radio broadcaster clients because they would "pull the plug."[4] Tr. 11,430 (Mandelbrot).

The Librarian's Order faults Broadcasters for not quantifying these differences. Librarian's Order at 45,255 (JA-499). Of course, the Yahoo testimony does quantify the impact of the differences by putting an upper bound on the fee broadcasters would pay—a fee below .05¢ per performance, which is well outside the Librarian's "zone of reasonableness."

Further, as discussed above, this reasoning turns the statute on its head. The statute limits the Librarian to consideration of comparable agreements. That requirement obligates the Librarian to make a reasoned threshold determination that a benchmark agreement is

[4] The Government faults Broadcasters (Br. 72) for not claiming that they have been driven out of business or harmed by the Librarian's rates. To the contrary, in addition to Yahoo's testimony, Broadcasters amply demonstrated that broadcasters would cease streaming if significant fees were imposed. Broadcasters' Br. 16, 26. Of course, neither the Panel nor the Librarian's rate decision could have been known before the record closed. Thus, it appears the Government is complaining about Broadcasters' failure to submit extra-record evidence, a complaint that rings hollow in the face of the Government's pending motion to strike extra-record evidence that even Yahoo itself ceased radio retransmissions shortly after the adoption of the Librarian's rate. The Government cannot have it both ways.

"comparable." The Panel may not ignore material marketplace differences, select a non-comparable agreement, and then put the burden on a party to "quantify" differences from that agreement.

Rather than address the evidence, the Government argues that these differences are irrelevant as a matter of law. However, the principles cited are inapposite and say nothing about the question of whether the Yahoo Agreement was "comparable" for purposes of ascertaining the fee that a willing buyer would pay a willing seller in the relevant market.

First, the Government argues that the Third Circuit decision in *Bonneville International Corp. v. Peters*, 347 F.3d 485 (3d Cir. 2003), forecloses Broadcasters' claim of deference. It does nothing of the sort. *Bonneville* involved a specific narrow legal issue—construction of the section 114(d)(1)(A) exemption from the sound recording performance right for "nonsubscription broadcast transmission[s]." 17 U.S.C. §114(d)(1)(A). Broadcasters argued in that case that Internet streaming by radio broadcasters of their over-the-air programming was wholly exempt from the sound recording performance right; the Copyright Office, and ultimately the Third Circuit, disagreed. *Bonneville* nowhere addressed the sound recording statutory license in section 114(d)(2) or the proper construction of the "willing buyer/willing seller" fee standard in section 114(f)(2)(b). Contrary to the Government's assertion (Br. 71), it certainly did not consider how to assess "the commercial value" of a given performance of a copyrighted sound recording.[5]

Notably, although the Copyright Office's rule that was contested in *Bonneville*, 65 Fed. Reg. 77,292 (Dec. 11, 2000), and the District Court decision upholding that order, *Bonneville*

[5] The Government does not even pose the relevant issue correctly. The question is not "the commercial value of a given copyrighted sound recording" but the value of the right to perform a

Int'l Corp. v. Peters, 153 F. Supp. 2d 763 (E.D. Pa. 2002), both preceded the commencement of the CARP, neither the Panel, nor the Librarian's Order, even mentions, much less relies upon, this argument. It is a post-hoc rationalization by counsel for the Government. As such, it does not merit consideration. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)(no deference to agency litigation positions).

The Government next argues that the differences are irrelevant because a fair market rate does not require consideration of "potential failure of those businesses that cannot compete in the marketplace." Government Br. 71, quoting Librarian's Order 45,254 (discussing the effect of a fee order on "particular individual services," not an entire class of willing buyers) (JA-0498). This misses the point. The issue is not whether particular services fail after the fact; it is what the majority of a particular type of willing buyer is willing to pay ex ante. Buyers will not pay fees they believe will harm their business. That is precisely what happened in the marketplace of broadcaster buyers.

Moreover, this again is a post-hoc rationale by Government counsel; this was not the rationale relied upon by the Librarian in addressing commercial broadcasters, which the Order discussed as a different class of buyers. Librarian's Order 45,254-55 (JA-0498-99). Even the Copyright Owners (Br. 6) describe Broadcasters and Webcasters as different "categories of eligible nonsubscription services."

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copyrighted sound recording, by different classes of buyers facing different economic circumstances.

Further, the Government's argument proves too much. Under that rationale, the Librarian could pick any single buyer willing to pay supra-competitive prices, with no analysis of comparability, and ignore the effect of such fees on others in the marketplace. Such a result is inconsistent with the statute's requirement that agreements be evaluated for comparability. It is inconsistent with the decision of the Panel and the Librarian in this case to treat non-commercial broadcasters differently from commercial broadcasters. It is also inconsistent with the mandate of section 114(f)(2)(B), that "rates and terms [set by the Librarian] shall distinguish among the different types of eligible nonsubscription transmission services then in operation." Moreover, the Government's post-hoc rationale is inconsistent with the underlying statutory standard described by the Librarian himself—the "'rates to which, absent special circumstances, most willing buyers and willing sellers would agree.'" Librarian's Order 45,244-45 (JA-0488-89). A single non-comparable buyer does not reflect what most willing buyers will pay.

IV. THE LIBRARIAN ACTED ARBITRARILY IN DISREGARDING THE PANEL'S WELL-SUPPORTED DETERMINATION THAT THE RADIO RETRANSMISSION RATE SHOULD BE "CONSIDERABLY LOWER" THAN THE INTERNET-ONLY RATE

The Librarian's Order correctly observes that where a factual finding of the Panel is well supported by the record, the Librarian is not free to disregard it. *See, e.g.,* Librarian's Order 45,243, 45,244, 45,253, 45,257 (JA-0487, JA-0488, JA-0497, JA-0501). The Government itself asserts this principle repeatedly to defend aspects of the Librarian's decision before this Court. Government Br. 65, 77.

However, the Librarian wholly ignored this principle in connection with the Panel's determination, based on extensive record evidence, that the radio simulcast rate should be "considerably lower than [Internet-only] rates." Report 74-75 (JA-0408-09). The Panel cites extensive record evidence to find:

> essentially undisputed testimony that traditional over-the-air radio play has a tremendous promotional impact on phonorecord sales. Indeed, record companies have spent many millions of dollars over many decades to promote over-the-air play of their releases. [Citing Rosen, Altschul, Ciongoli, Wilcox, Kenswil, Fine, Donahoe and S. Fisher.] Also, endorsements from familiar, trusted radio station DJs are a key element in promoting sales. [McDermott, S. Fisher.] To the extent that internet simulcasting of over-the-air radio broadcasts reaches the same local audience with the same songs and the same DJ support, there is no record basis to conclude that the promotional impact is any less. [Donahoe, McDermott.]

Id. at 74-75 (citing many RIAA witnesses, as well as others). The Panel also found that RIAA's concern about displacement of CD sales from Internet transmissions does not apply equally to radio retransmissions. *Id.* at 75 (citing RIAA witnesses).

The Government asserts that "Broadcasters do not dispute that there is a complete lack of record evidence supporting a rate differential." Government Br. 77. Once again, the Librarian appears to be in denial, ignoring Broadcasters' Opening Brief (29-31), where Broadcasters catalogued the evidence set forth above, as well as other evidence, including the direct testimony of Yahoo's witness. To quote: "the record contained extensive evidence from record company and Service witnesses that the simulcasting of radio broadcasting was materially different than Internet-only webcasting, and should be subject to a lower fee. The Panel agreed."[6] Broadcasters' Br. 29.

The Government argues that the Librarian was correct to disregard the Panel's determination that radio simulcast fees should be "considerably lower" than Internet-only fees because it was not supported by his view of the Yahoo negotiation, which he characterized as setting a unitary, bottom line rate. Government's Br. 75-77. However, if Librarian found that the Panel's fully supported determination doesn't fit the Yahoo model, then the correct

[6] The Government's unsupported and uncited assertion that Broadcasters argued to the Librarian that the record did not support separate fees for radio retransmissions and Internet-only transmissions is bizarre. Government Br. 77. All broadcasters in the proceeding continuously contended that a significant difference was appropriate and was supported by the record.

conclusion should have been that the Librarian's acceptance of the Yahoo model was flawed, not that the Panel's determination was flawed.

The Panel's decision was based on the record evidence and was properly explained. The Librarian was bound to reach a decision that recognized a radio simulcast rate "considerably lower than [Internet-only] rates." Panel 74.

V. THE SERVICES' MUSICAL WORKS BENCHMARK MODEL WILL PROPERLY BE BEFORE THE REGISTER AND LIBRARIAN ON REMAND.

The Government's brief (Br. 72) argues that Broadcasters failed to appeal the Librarian's acceptance of the Panel's decision not to rely upon the Services fee evidence—i.e., the fees paid for the right to make public performances of the musical works embodied in sound recordings—and that therefore, "Broadcasters should not be heard to complain" about the Yahoo rate. That argument misses point.

The Librarian's Order did not reject the longstanding, closely analogous and equally necessary musical works performance right as a benchmark; it concluded that the Panel was free to choose the RIAA's 26 agreements over that benchmark. Librarian's Order 45,247 (JA-0491). Of course, the Panel and the Librarian properly rejected the probative value of 25 of the 26 agreements. In this appeal, Broadcasters argue that it was arbitrary for the Panel and the Librarian to rely on the 26th agreement, the Yahoo agreement, to set the fee for Broadcasters. If Broadcasters are correct, on remand, the Librarian and Register will need to re-consider the entire record, giving little or no weight to the Yahoo agreement. The musical works benchmark will, at that time, be the most probative evidence in the record.[7]

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[7] The Services' model is mischaracterized as "theoretical." There is nothing theoretical about it. The fees used were actual, longstanding fees paid in a mature market by the very same buyers—broadcasters—for the unrestricted right to perform musical works. The musical work benchmark has been recognized by the Librarian to be probative of appropriate sound recording performance fees. Determination of Reasonable Rates and Terms for the Digital Performance of Sound

VI. RIAA'S 25 REJECTED AGREEMENTS AND THEIR "115 OTHER AGREEMENTS" DO NOT SUPPORT HIGHER FEES.

Copyright Owners complain that the Panel and Librarian rejected the 25 non-Yahoo agreements negotiated by the RIAA cartel in a pre-CARP effort to create evidence of supra-competitive fees. They also complain about the Librarian's failure to credit other agreements entered into by the cartel's member companies that RIAA did not even claim should be used as benchmarks, but should only be used for corroboration. Finally, they complain that a $500 minimum fee is insufficient, and that anyone who wants to use the statutory license should be required to pay at least $5,000 regardless of how many sound recordings are performed to how many listeners. These claims should be quickly rejected.

A. The 25 Agreements Negotiated by the RIAA Cartel To Create Evidence for this Proceeding Are Not Probative of a Competitive Free Market.

As described in Broadcasters Opening Brief (Br. 8) the Panel found that RIAA embarked on a strategy to use its collective market power and antitrust exemption to enter into agreements "for the purpose of establishing a high benchmark for later use as precedent in the event a CARP proceeding were necessary" and to make only those deals "that would be in substantial conformity with [its predetermined] 'sweet spot.'" Report 48 (JA-0382). This finding was supported by a wealth of record evidence, including RIAA's own negotiating materials and testimony from RIAA's chief negotiator. *See* Report at 48-60 (JA-0382-94). The Report also noted the need to approach these agreements with caution, as they were negotiated "within the context of a newly emerged industry (webcasting) involving newly created rights." Report 47

(Continued . . .)
Recordings; Final Rule, 63 Fed. Reg. 25,394, 25,409 (May 8, 1998) (the Preexisting Subscription Services Proceeding). Even Copyright Owners (Br. 28), discussing this decision, characterize it as using a "benchmark[] from comparable market place transactions." Indeed, you cannot make a sound recording performance on radio or on the Internet unless you have the musical work right.

(JA-0381). It was not arbitrary for the Panel to find that these agreements were tainted and were simply not probative of any competitive market fee.

RIAA fought to hide its strategy, relying on the restrictive Copyright Office discovery rules and confidentiality provisions in its agreements, to prevent discovery of its negotiating materials during the pre-hearing discovery period. *See, e.g.*, Order in Docket No. 2000-9 CARP DTRA 1&2 at 15-16 (June 22, 2001) (JA-0156-57); Order in Docket No. 2000-9 CARP DTRA 1&2 (Aug. 3, 2001) (JA-0165-68); *see also* Tr. at 201-204 (counsel describing motions practice surrounding confidentiality provisions)(JA-0547-50). In fact, this material was not made available to the Services, still over RIAA's objections, until after the arbitration hearing had actually started and the Panel recognized its importance. Order in Docket No. 2000-9 CARP DTRA 1&2 at 4 (Aug. 14, 2001) (JA-0174). Having been unmasked, RIAA cannot be heard to complain (Br. 19) that the decision "essentially closes the door on congressionally mandated voluntary negotiations." At most, it closes the door on anticompetitive efforts to rig the evidence before the CARP.

Nor does the decision write anything "out of the statute." Copyright Owners' Br. 28. Copyright owners still may enter into voluntary negotiations and, to the extent those agreements are comparable and reflect negotiations in a competitive marketplace unaffected by a plan to create CARP evidence, they may be considered in setting a CARP fee. Copyright Owners' lament about the demise of voluntary agreements can only reflect their belief that RIAA's members will not engage in competitive negotiations that will pass this test. That is not a flaw in the statute or the Librarian's rejection of the 25 agreements. If anything, it further highlights the error of the Panel's and the Librarian's reliance on the Yahoo agreement.

Finally, not one of the 26 agreements was with a radio broadcaster. Thus, the agreements say nothing about what radio broadcasters, as willing buyers, would pay for the right to make simulcast Internet transmissions of their radio programs.

B. RIAA's 115 Other Agreements Corroborate Nothing.

Copyright Owners also complain that the Panel and Librarian did not give more weight to the 115 agreements negotiated by members of the RIAA cartel that RIAA dumped into evidence as "corroboration." But Copyright Owners admit that "RIAA never suggested that these agreements . . . should be viewed as benchmarks." Copyright Owners' Br. 19. Rather, they argue, the agreements were presented to corroborate the rates in the 25 rejected agreements.[8] *Id.*

Copyright Owners, of course, misunderstand the subordinate nature of corroboration—corroborating evidence is evidence that "strengthens or confirms other evidence (esp. that which needs support)." BLACK'S LAW DICTIONARY 577 (7th Ed. 1999) (emphasis added). Once the 25 principal agreements were rejected for the valid grounds discussed above, there was nothing left to for the 115 agreements to corroborate. It was not error for the Panel and the Librarian to reject them.

C. There Is No Basis To Increase the Minimum Fee.

Copyright Owners also rely on their discredited agreements to argue for an order of magnitude increase in the minimum fee established by the Panel and the Librarian. The same defects discussed in Part VI.A. fully justify the conclusion that the agreements over-stated the minimum fee that would prevail in a freely competitive marketplace. In light of the finding that RIAA engaged in a concerted effort to negotiate over-priced agreements, Copyright Owners

[8] As a result, they were not subjected to the discovery or close scrutiny of the 26 agreements relied upon by RIAA as benchmarks.

cannot be heard to complain that the Panel and Librarian picked the lowest of the minimum fees as setting an upper bound on a competitive free market fee a willing seller would accept.

The purpose of the minimum fee under a priced per-performance fee license is to defray marginal administrative costs. Librarian's Order 45,262. (JA-0506). There is no justification for a higher floor on the price that a service with few listeners pays for making few performances.

VII. THE GOVERNMENT'S MOTION TO STRIKE TWO FOOTNOTES (AND ACCOMPANYING ADDENDA) FROM BROADCASTERS' BRIEF IS WITHOUT MERIT.

For the reasons set forth in Broadcasters' August 4, 2003 Opposition, incorporated here by reference, the motion to strike two footnotes from Broadcasters' Opening Brief filed by the Government and Copyright Owners ("Movants") is without merit. Contrary to the assertions of the motion and Government's brief (Br. 14, 43), Broadcasters did not make "extensive use" of, or "extensive reference" to, extra-record material. Broadcasters built their arguments on the record evidence, and included two confirmatory footnotes about post-hearing developments. Further, the footnotes were proper, as the Government's own brief demonstrates.

Reviewing courts regularly consider information "arising after the agency action [that] shows whether the decision was correct or not." *Esch v. Yeutter,* 876 F.2d 976, 991 (D.C. Cir. 1989); *see, e.g., Nat'l Trust for Historic Preservation v. Blanck,* 938 F. Supp. 908, 915-16 & n.10 (D.D.C. 1996) (reviewing agency action "based on the administrative record" but considering after-developed photographic evidence), *aff'd,* 203 F.3d 53 (D.C. Cir. 1999); *LeBoeuf, Lamb, Greene & MacRae, LLP v. Abraham,* 215 F. Supp. 2d. 73, 82 (D.D.C. 2002) (considering facts that occurred after the challenged agency action that showed whether agency's decision was correct), *vacated on other grounds,* 347 F.3d 315 (D.C. Cir. 2003). Courts also regularly take judicial notice of facts under Federal Rule of Evidence 201, which the motion concedes (¶ 10) is proper.

Broadcasters' argued at length (Br. 25-27) that the record evidence demonstrated that the Librarian's .07¢ per performance fee was far higher than most willing buyers would agree to pay and would drive broadcast streamers off the Internet. Challenged footnote 11 noted the confirming fact that even Yahoo itself stopped broadcast streaming after the fees were imposed. The announcement by Yahoo was a generally known, easily verifiable fact that cannot be and is not disputed. It is subject to judicial notice. Fed. R. Evid. 201(b). *See Washington Post v. Robinson*, 935 F.2d 282, 291-92 (D.C. Cir. 1991) (facts reported in *Washington Post*).

Broadcasters also argued at length from record evidence that the Yahoo agreement was negotiated by a company with a vastly different business from Broadcasters under vastly different conditions than would obtain in a freely competitive market. Broadcasters' Br. 19-29. Challenged footnote 12 noted that, after the hearing was over, the founder of the business that became Yahoo's streaming service publicly acknowledged that the agreement "was designed with rates that would drive others out of the business." This material also confirmed the Librarian's error.

Nothing in 17 U.S.C. §802(g), authorizing judicial review "on the basis of the record," imposes unique jurisdictional constraints in derogation of established review principles. Judicial review is routinely conducted "on the basis of the record." The cases cited by the Government do not address the scope of review, they address attempts to expand the substantive liability of the government, either by expanding available remedies or increasing the number of courts with jurisdiction. *See, e.g. Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261-63 (1999) (refusing to award monetary damages against the government where not authorized by 5 U.S.C. § 702); *Ramey v. Bowsher*, 9 F.3d 133, 134, 136-37 (D.C. Cir. 1993) (refusing to exercise jurisdiction where Congress had assigned jurisdiction to the Federal Circuit).

Further, the Government's own brief belies its motion to strike. In direct violation of the rules it seeks to impose on Broadcasters, the Government presents and relies upon extra record material.[9] Government Br. 72 n.15. The Government cannot have it both ways. It has waived its motion to strike.

[9] As a substantive matter, the Government's citation to a two-year fee agreement for 2004-2005 to preserve the unsatisfactory status quo pending this appeal does nothing to support the Librarian's fees. If anything, it confirms the importance of litigation cost savings in assessing the rates set under the Yahoo agreement. It would have been foolhardy for Broadcasters to spend millions of dollars more on another CARP for a two-year period to support an activity of questionable economic value under the then existing circumstances. This appeal, challenging the rate that would have been cited as precedent, was pending. The *Bonneville* appeal, which could have wholly exempted Broadcasters from the sound recording performance right, was pending. H.R. 1417, the Copyright Royalty and Distribution Reform Act, was moving through Congress to reform the CARP system into a far less costly and more equitable system with government-paid Copyright Royalty Judges and broader discovery, to prevent abuses such as the RIAA's efforts to cook the record in this case.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Broadcasters' Opening Brief, this Court should vacate and remand the Librarian's decision, with instructions (i) to disregard the Yahoo agreement as not comparable for purposes of determining the fee radio broadcasters would pay to transmit their broadcast programming over the Internet, (ii) that if the Yahoo agreement is to be used at all, the fee applicable to broadcasters must be reduced to properly account for (a) Yahoo's litigation cost savings, (b) the market power and concerted action of the RIAA cartel, and (c) and the differences between Yahoo and radio broadcasters, (iii) to adopt a radio retransmission rate "considerably lower" than the Internet-only rate, and (iv) to reject the arguments of RIAA's petition for review.

Respectfully submitted,

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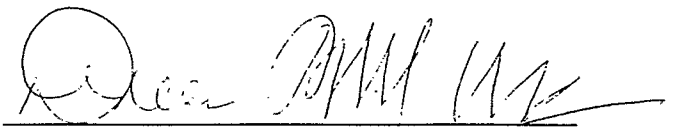
March 4, 2004

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and (C), D.C. Cir. R. 32(a), and this Court's briefing format order of April 4, 2003, the undersigned certifies the following:

1. Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir R. 32(a)(2), this brief contains 7,449 words.

2. This brief has been printed using a proportionally spaced, 12-point Times New Roman typeface.



Dineen Pashoukos Wasylik

March 4, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March 2004, I caused copies of the foregoing Final Reply Brief for Participant Licensee Petitioners Salem Communications Corp. and the National Religious Broadcasters Music License Committee to be served first class U.S. mail, to the following:

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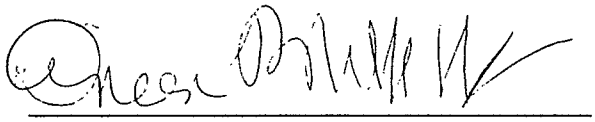

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